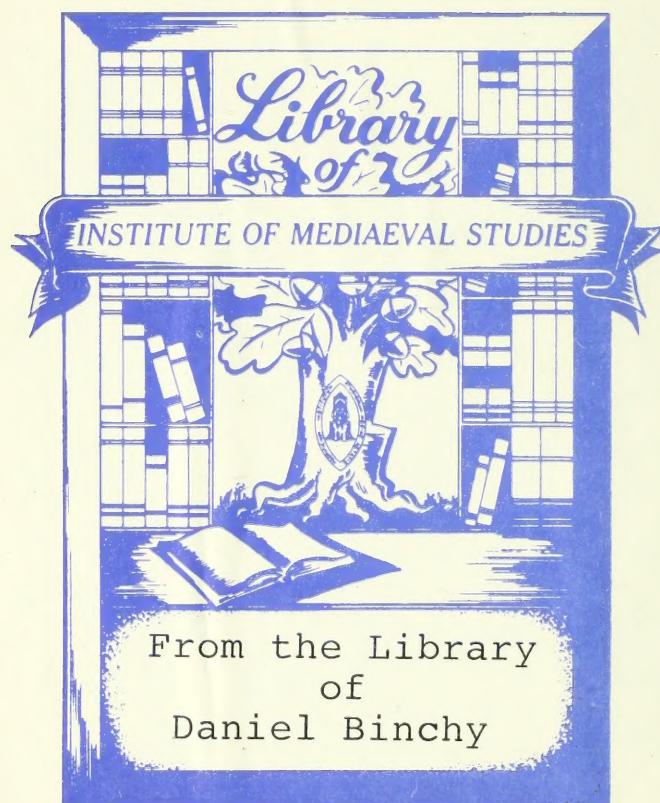
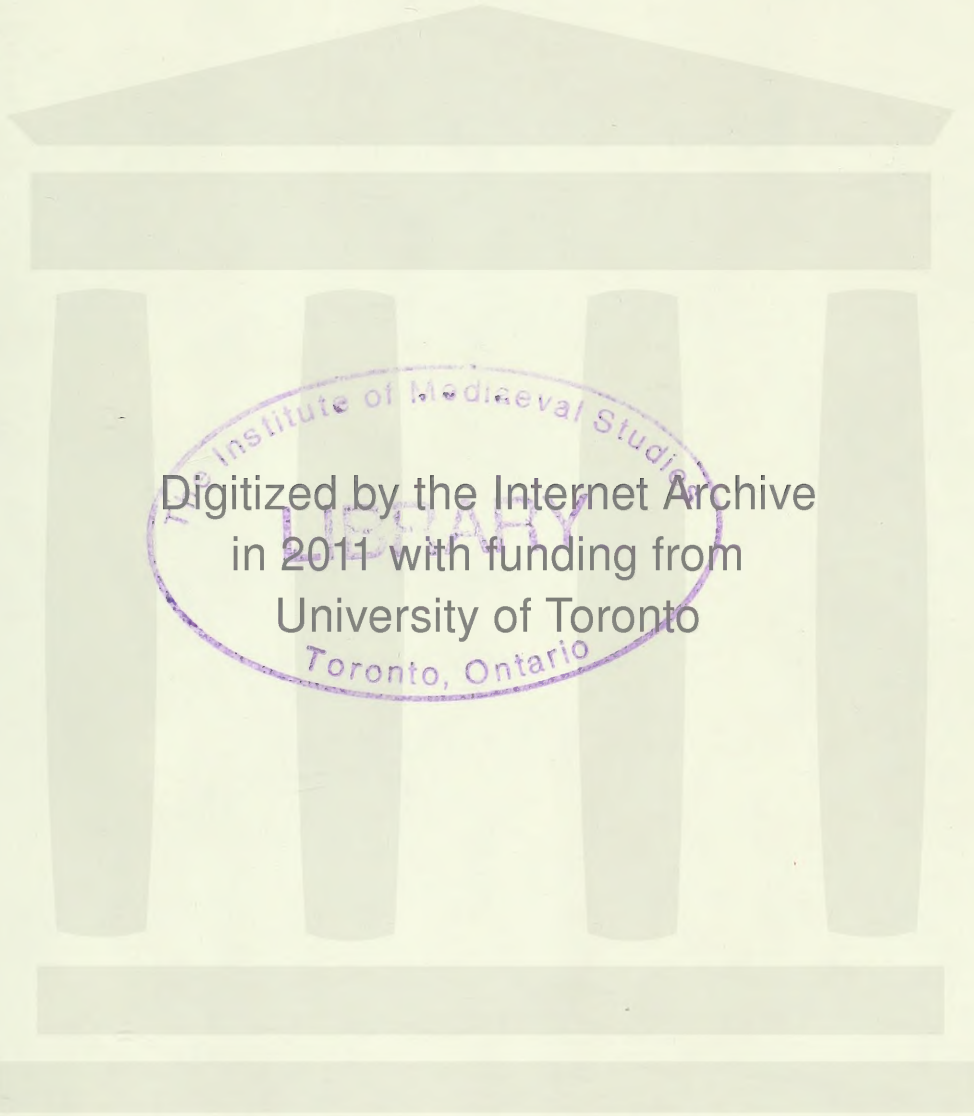


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PAUL COLLINET
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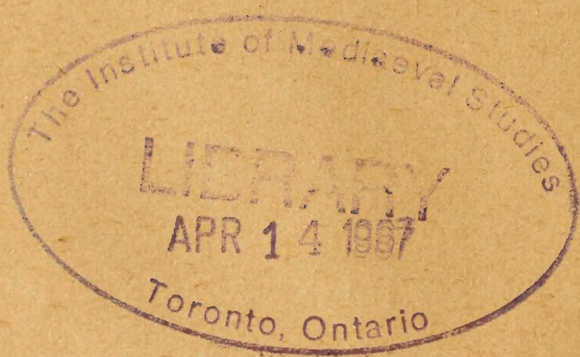
THE GENERAL PROBLEMS
- RAISED BY THE -
CODIFICATION OF JUSTINIAN

FOUR LECTURES DELIVERED MARCH 8TH, 10TH, 13TH AND
15TH, 1922, BEFORE THE UNIVERSITY OF OXFORD

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THE GENERAL PROBLEMS RAISED BY THE CODIFICATION OF JUSTINIAN.

BY

P. COLLINET (PARIS).

Four Lectures delivered March 8th, 10th, 13th and
15th, 1922, before the University of Oxford ¹).

INTRODUCTORY.

It is a well-known fact that, in the study of Roman law during the centuries from the Middle Ages to our day, a change of attitude has occurred which has necessarily produced a change in method.

During a long time, Roman law was considered as "written common sense" (*ratio scripta*), as the guiding spirit for the practice of law. Under the influence of that conception and of that aim, the method used in the study of the codification of JUSTINIAN was purely "juridical" or "didactic" or "dogmatic", like that which now is used for the study of modern law.

When jurists began to study Roman law without any practical aim, for its' own sake, and tried to reconstruct its development, they were obliged to use a new method, which was "historical".

Nowadays, that historical method is the principal one used by scholars who study Roman law, the world over.

¹) I express my gratitude to my friend, Prof. F. DE ZULUETA, for having given to me at Oxford the most cordial and complete assistance, specially in discussing with me many points of these lectures. I address also my best thanks to Miss ISABELLE BRIDGE, M. A., J. D., who previously had been so kind as to revise carefully the English text.

The general problems that I intend to examine are historical problems the solution of which is, of course, to be found by means of historical method. But, in the treatment of these problems, I should like to show that the historical method, as it is applied to-day, is not yet broad enough and must be developed as far as possible. That is necessary, I think, if we would reconstruct more completely and more surely Roman law, classical as well as Byzantine and primitive (the consideration of the primitive Roman law remaining outside our present plan.)

My meaning is that, up to now, the historical method, as used by Roman lawyers, has been rather critical than properly historical, *i. e.* rather the method used by philologists than that used by historians. In my opinion, indeed, many new and important results may be obtained if scholars will endeavour to consider the compilation of JUSTINIAN as a work whose interpretation must be historical, *i. e.* a work which, to be thoroughly understood, must not be isolated from the historical atmosphere and political circumstances in which it came to birth. In other words, scholars will endeavour to use, to its full extent, historical criticism in which philological and juridical criticisms are far from being the only elements.

Criticism, as understood by many authors (for example, recently, by GERHARD BESELER) is merely "textual criticism". By such a method, as a matter of fact, Byzantine elements in the *Corpus iuris* can be distinguished from classical. It even permits the reconstruction of the progress of institutions. But it only succeeds in registering their variations. Now, the historian must not only note facts, but, if possible, explain them, by discovering their sources and their causes. In the particular case, as regards the Byzantine innovations, he must look for the sources whence they came as well as for the causes which determined them. He will attain these results only by the aid of the full historical method.

This idea, which I am applying in my books entitled "Études historiques sur le Droit de Justinien", I shall endeavour to develop and summarily prove in the course of these lectures on "The general problems raised by the codification of JUSTINIAN".

Before approaching the question, I will make two reservations:
a) I shall only speak of the three chief works of JUSTINIAN:

the Code, the Digest and the Institutes. I will pass over the Novels of JUSTINIAN, because they do not raise the same difficulties as the other three works and because their study does not offer so great an interest for students.

b) I wish to deal only with those general problems which are common to the three works, without discussing any of the special theories which are treated in the ordinary lectures on Roman law. When you hear the plan of my lectures, you will immediately perceive my reasons for choosing such a subject, although it is rather outside the boundaries of the usual study of Roman law.

Here is the plan of the lectures:

1°. There is an antecedent general problem which belongs to political history: that is why JUSTINIAN commanded the codification of the *leges* and the *ius*, how he was inspired to undertake so extensive a work and under the influence of whom. (This last point must be examined only in connection with the last problem).

2°. The second problem is one of the two principal ones the solution of which is necessary for a satisfactory knowledge of the historical development of Roman law, after the primitive period.

The Code, the Digest and the Institutes were composed on the same plan. They all contain a mixture of classical and Byzantine passages. As the first duty of the legal historian is to classify the texts in chronological order, it is of the greatest interest to ascertain as exactly as possible the period of the texts which he studies. The Byzantine origin of many texts is very easily recognized (for example, in the Code, the constitutions of the Emperor JUSTINIAN). But, in the greater number of cases, it is impossible to distinguish at first sight the classical from the Byzantine elements, so complete has been the fusion of classical foundations and Byzantine innovations which the compilers have effected in the *Corpus iuris*, and specially in the Digest, by means of interpolations.

In order to distinguish the classical elements from the Byzantine, the modern school has been driven to make use of the most adequate instrument, *i. e.* the critical method. The modern school has discovered many tests, formal or substantial, the application of which has already led to innumerable reconstructions of lost classical institutions.

These tests, old or new, are partly of a philological, partly of a juridical, less often of an historical order.

My object is to show that the number of available tests of an historical nature is greater than the modern school believes. These historical tests have been established and applied in my own books, only one of which has as yet appeared. They are drawn from the peculiar spirit of Byzantine law, *i. e.* the law of the 4th, 5th and 6th centuries. They are the characteristics which belong properly to Byzantine law and were unknown to classical Roman law. I dare not say that all of them are new, but I think that students of Roman law ought to be more intimately acquainted with them. It is the determination of these peculiar characteristics which forms the second problem.

3°. The third problem is also important for the more complete knowledge of the historical development of Roman law.

The question is whether the commissionners charged by JUSTINIAN to edit the Code, the Digest and the Institutes, after they had taken as the basis of their works numerous texts borrowed from classical sources, themselves originated the innovations which they mingled with the classical passages, or whether they did not derive these innovations from some already existing, but post-classical sources.

The problem is related to the question of pre-JUSTINIAN interpolations. At first sight, it seems to be one of historical curiosity, of pure chronology. In fact, it is one of the chief problems of the whole history of Roman law. It is a problem not less important than the study of the genesis of classical Roman law between the end of the Republic and the 3rd century A. D. For, only by its solution can we reconstruct the progress of Roman law in the post-classical period, for which the extant sources other than the codification of JUSTINIAN are extremely scanty.

4°. The fourth problem has reference to the method which was used by the commissionners in drafting the Code, the Digest and the Institutes. We shall see how our solution of the preceding problem can clarify the question — how, in particular, that solution facilitates the solution of the enigma: how the commissionners were able to fulfil their task in so short a time (less than three years for the Digest, a considerable law-work).

Hence the titles of the four lectures:

FIRST PROBLEM. — *The Aim of the Codification of Justinian.*

SECOND PROBLEM. — *The general Characteristics of the Codification of Justinian.*

THIRD PROBLEM. — *The Sources of the Codification of Justinian.*

FOURTH PROBLEM. — *The Drafting of the Codification of Justinian.*

We leave aside another general problem, the question of the value of the codification of JUSTINIAN, which is still the subject of much discussion. This problem cannot be solved without entering into the special theories of Roman law. A definitive judgment on the value of JUSTINIAN'S law-works must be the result of critical and historical studies as yet scarcely begun. Nevertheless, I am quite confident that the future will judge JUSTINIAN more favourably than the past has done.

Turning to our problems, one can see that each of them raises enormous difficulties, because, first, they are not answered by any historical texts and, secondly, because although learned men of every time and country have been much occupied with the study of Roman law, these problems have not been sufficiently discussed. — To the first problem, only one vague answer has been made. — The examination of the second problem is even now passed over. — The third is hardly beginning to be approached. — The fourth has received several answers, but their value must be carefully weighed.

I shall endeavour to present the solutions of these problems as clearly as possible, referring for the proofs to my own books. If I succeed in attracting the attention of Oxford men to the interest that the historical as well as the dogmatic study of Roman law presents, if I succeed in directing their curiosity towards almost unexplored fields, I shall have reaped the richest harvest from the opportunity which the Faculty of Law of this famous University has offered to me by its flattering invitation to deliver these lectures before one of the most distinguished academic audience in England.

FIRST PROBLEM.

The Aim of the Codification of Justinian.

The three law-books the preparation of which was ordered by JUSTINIAN are different in their materials, nature, sources and aim:

1°. The *Code*, a collection of Imperial constitutions or *Leges*, passed through two editions: the first, ordered on February 13th, in the year 528 A. D. and promulgated on April 7th, 529; the second, promulgated on November 17th, 534.

2°. The *Digest*, which may be called the "body" (in French, *la somme*) of the *ius*, i. e. legal productions of classical jurisprudence, was ordered on December 15th, 530 and promulgated on December 16th, 533.

3°. The *Institutes*, an elementary text-book for the use of students, was promulgated on November 21th, 533.

What was the object of JUSTINIAN when he ordered the codification?

One of the best legal historians, PAUL KRUEGER, replies: "It is scarcely doubtful that the chief motive of JUSTINIAN's works in the matter of legislation was love of glory, personal vanity". Other historians tell us that, to his military successes, JUSTINIAN desired to add success as a law-maker.

That is possible. But you will agree that love of glory or personal vanity are but remote motives. NAPOLEON, in ordering the French Codes, was also impelled by love of glory; nevertheless, other motives less remote were the immediate causes of his undertaking: first, the need of giving a unified legislation to France which, having had under the Ancien Régime numerous different systems of customary local law, had become a unified nation; secondly, the need of fusing the traditional law with the legislative conquests of the Revolution. We must look for analogous motives with JUSTINIAN.

Our answer is a purely hypothetical one, since neither the Prefaces of the three works, nor any of the Byzantine historians throw any light on the subject.

I believe that JUSTINIAN was inspired in undertaking the codification by two ideas:

1°. He, or more likely his advisers, naturally realized, as soon

as JUSTINIAN had become in 527 the sole ruler of Roman Empire, that, in the matter of codification, the East was very far behind the West. The comparison between the two parts of the ancient world was so much the more striking that the West was in the hands of Barbarians, whereas the East was the continuation of the Roman Empire, being called by Later Imperial authors *Romania*.

Now then, in the year 527, the Barbarian Kings of the West had already ordered several codifications, either of Germanic customs or of Roman law:

Germanic customs: — by the Visigoths: *lex antiqua* of Euric (466—484);

— by the Burgundians: *lex Gundobada* (circa 500);

— by the Salian Franks: *lex Salica* of Clovis (488—496).

Roman law: — by the Burgundians: *lex romana Burgundionum* (= the Papien) of Gundebald (480—500);

— by the Visigoths: *lex romana Visigothorum* (= the Breviary of Alaric) (506);

— by the Ostrogoths: *Edictum Theodorici* (the date of which is as yet disputed, either circa 500 or 511—515).

Is it then pure fancy to imagine that the existence of such codifications in countries under the Barbarian rule awoke in JUSTINIAN a feeling of emulation and consequently the project of effecting a work that should be equivalent to that of the Barbarian Kings, who were less powerful than himself and so recently settled in the old Roman territory?

Is it not quite natural to think that particularly the codification of the *Edictum Theodorici* highly excited the Imperial jealousy, for Theodoric, who occupied the throne in Italy, was considered by the Emperors of Constantinople as a mere vassal?

This historical fact leads us to the probable second motive of JUSTINIAN.

2°. This second motive was, in my opinion, the attraction that, already in the year 527, Italy exercised on JUSTINIAN. After the invasion of the Ostrogoths, the Emperors of the East always considered themselves as keeping a right of suzerainty over Italy and considered the King of the Ostrogoths as nothing more than "the delegate of the *basileus* and the instrument of the Imperial policy" as Prof. CH. DIEHL says. He recalls the word attributed

by the Byzantine chroniclers to JUSTINIAN, when beginning his war against the Goths, saying: *Ἰταλίαν τὴν ἡμετέραν* (*Italiam nostram*). Historians have in fact established that JUSTINIAN, the Emperor of Constantinople, from the moment when he was put upon the throne, was casting a glance on Italy. A little later, he certainly contemplated the reconquest of Italy and, to this end, he managed to create reasons for intervention there before 535.

I believe that I have proved (in the 1st part of my "Etudes") that JUSTINIAN did not undertake his legislation under the influence of Italy which he reconquered only after the completion of the Code, Digest and Institutes. Nevertheless, I think that JUSTINIAN, in ordering the codification, had in view an Empire that should comprise "his" lost Italy as well as the East, that, though he did not take into consideration the law then in force in Italy, he intended to make a codification which, eventually, could be applied to Italy reconquered as well as to the East.

Therefore, the projected codification must be more complete than those of the Barbarians, above all than the *Edictum Theodorici*, which, as a matter of fact, is a very short and by no means an exhaustive law-work.

For political reasons and perhaps also on account of the religious motives, by which JUSTINIAN was constantly inspired during his long reign, the codification, unlike the Barbarian Codes, must contain, not only the actual law, but also extracts from the constitutions and law of the classical age; it must give to the old law of the Early Empire a new life in order to unite JUSTINIAN's policy to that of the most brilliant period of Roman history. Thus, the chief element of this codification was to be the Digest, a collection of fragments from classical Roman jurisprudence, adapted to the oriental attitude of the 6th century.

SECOND PROBLEM.

The general Characteristics of the Codification of Justinian.

The general characteristics of the codification of JUSTINIAN are furnished by the Byzantine elements added to the classical by means of interpolations. It is precisely the innovations made by the commissionners that impress their characteristic nature on the codification.

What are these general characteristics? How is it possible to discover them?

The study of history and the examination of present legislation reveal the fact that the general characteristics of any legal system are determined:

1°. by the extent of the territory governed by the law-making political authority;

2°. by the origin of the legislation or, to speak more clearly, by the nature of the source which produces the legal system;

3°. by the degree of liberty (autonomy), which citizens enjoy in the transaction of legal business of all kinds;

4°. sometimes by the special influence of Religion on Law.

PLAN:

§§ I. The oriental note.

II. The scholastic note.

III. The non-formalistic note.

IV. The Christian note.

§ I. THE ORIENTAL NOTE.

According to the extent of the territory governed by the law-making political authority, the legal system appears as either *national*, *universal* or *local*.

Thus, primitive Roman law was national. The classical was universal as, later on, in the Middle Ages, canon law was to be; for, classical Roman law was applied, not only in Rome and Italy, but in all the *orbis romanus*, which formed the whole ancient civilized world. Only law created by the *Praesides provinciarum* was local, not universal.

The question raised for the law of JUSTINIAN is whether it is still as universal as classical law.

To answer the question, we must consider both the geographical territory to which it must be applied and the atmosphere in which it originated.

On the two points, we arrive at the conclusion that the codification is a comparatively local, more precisely, an oriental, not a universal work. For, first, the immediate application of the codification was to the Empire of the East, because, as we have

previously seen, the West had already long been outside Roman rule. Secondly, the atmosphere in which the Byzantine innovations originated was oriental. The commissionners of the three law-works were either political officers, or professors, or lawyers of Constantinople and of Beirut; no Roman or Italian jurist participated in the work; no influence of the law then in force in Italy can be perceived in the codification.

I shall not enumerate the applications of the oriental characteristics: the 1st part of my "Etudes" was entirely devoted to the demonstration of this point. My proofs have been approved by criticism. In particular, Prof. EDOUARD CUQ, the author of the "Manuel des Institutions juridiques des Romains" (1917) has given me assistance in making them known to students.

I should like to call the attention of my audience to the interest which still exists in discovering any new proofs of this same oriental characteristics. Since 1912, I have found by my own researches or in the works of other writers the following proofs:

- *adoptio minus plena* (BERGMAN);
- assimilation of the *curator* to the *tutor* (Albertario, Solazzi);
- the probable interpolations of many passages (I do not say: all) which contain a Greek word corresponding to the Latin word of the classical text, in this order: *quem (quam, quod) Graeci vocant (appellant, dicunt)*.

Example: *Inst.* 4, 4, pr., as compared with the extract of *Paulus libro singulari et titulo de iniuriis* preserved in *Coll. mosaic. et roman. leg.* 2, 5, 1. In my opinion, the phrase: "... contumelia, quam Graeci ἀδινίαρ vocant", the exact text of the manuscripts of the *Collatio*, is authentic. The intermediate phrases of the Institutes "... (contumelia, quam Graeci) [ὕβρις appellant, alia culpa quam Graeci ἀδίκημα dicunt, sicut in lege Aquilia damnum iniuriae accipitur, alia iniquitas et iniustitia, quam Graeci] (ἀδινίαρ vocant)" arise from a Byzantine addition. Mommsen wrongly considered them as omitted from the manuscripts of the *Collatio* and wrongly incorporated them in his edition of the *Collatio* on the pattern of the Institutes.

§ II. — THE SCHOLASTIC NOTE.

According to the origin of the legislation *i. e.* the nature of

the source which produces the legal system, it appears as either *practical* or *scholastic*.

Like primitive law, the classical Roman law was practical, because, in the classical as well as in the primitive period, law-makers were practitioners, not scholars. The jurists — in the broadest sense of the word — who improved the law by applying the well-known sources of custom, law, jurisprudence, edicts, constitutions, worked along the same lines; they availed themselves of any opportunity offered by undecided points of law which might arise either in the course of law-suits or in professional consultations. Even, in the classical period, the science of law, *iurisprudentia*, embodied in the *responsa prudentium*, is not comparable to modern legal science: because the *prudentes* are practitioners, not scholars, their science constitutes a legal source of a practical nature, like the opinions of practising lawyers to-day.

Do the Byzantine elements of JUSTINIAN'S law present the same practical characteristics?

As usual, the answer to this question depends upon the discovery of the source in which the legislation of JUSTINIAN has its roots: practice or the science of scholars? According to the nature of the source, the codification will present either practical or scientific note.

Modern writers on Roman law pay no attention to this problem, the solution of which appears to them self-evident. They take for granted that the compilers drew their inspiration from practice. In their opinion, the innovations found in the interpolations had been created during the pre-JUSTINIAN period by the practice of the courts and the only work of JUSTINIAN was to convert judicial decisions into statutes, as many other legislators have done before and after him.

My own opinion is absolutely the contrary. I think that, apart from certain innovations introduced by enactments of JUSTINIAN himself or suggested by oriental customary law (see my 1st book), the origin of the most numerous innovations is purely scientific and that their source is not practice, but legal science in the strictest sense of the word, *i. e.* the science of the scholars.

In particular, it is from science, not from practice, that the

commissioners drew the innovations which we find in the matter of Actions, Interdicts, Exceptions. I shall be satisfied with the examples of *utiles actiones* and *in factum actiones*, of course, in so far as given by interpolated texts. I call your attention especially to the curious *actio civilis in factum*, a variety of the main remedy for innominate contracts, the action so strangely called *actio praescriptis verbis*. All this cannot have been invented by the practitioners, but by the scholars.

This new opinion will be developed in my book entitled "La Nature des Actions, des Interdits et des Exceptions dans l'œuvre législative de Justinien", to be published after the book devoted to the study of the "Procédure par libelle", which study is the necessary basis for an exact knowledge of the Nature of the legal remedies.

The proofs of my thesis, which are given in my books, can be summed up as follows:

1°. The study of the history of Roman law in the Eastern Empire after the classical period shows that practice was quite unable to create all that is usually attributed to it. The culture of the practitioners (lawyers, notaries, judges) was too weak to bring about such deep reforms as those which appear in the interpolations; decisive and concurring indications in historical texts and papyri exist to prove the fact.

2°. As regards actions in particular, some documents testify that practice did not invent for them any new names, but was satisfied to adopt the general term, *cognitio extra ordinem*, without giving the action in hand a name.

Since the source of the innovations of the compilers is not practice, their origin can only be formed within the legal science taught in the law-schools.

This idea is based upon the following arguments:

1°. The scholastic form of numerous interpolations.

2°. The visible influence of the philosophical conceptions of the Neo-platonists upon the legal conceptions revealed through the establishment of several interpolations; for example, *natura actionis*, *natura contractus*, general actions (cf. my 1st volume). Practice could not be influenced by these philosophical conceptions, which were no more familiar to the mediocre lawyers of the Later

Empire than is modern philosophy to the average modern practitioners.

3°. Generalizations of particular legal doctrines; for instance, the addition of *ceteraeque servitutes* to passages originally speaking of a particular *servitus* only or of *ususfructus* which, in classical Roman law, was not a *servitus*, in the modern sense of the word, at all (LONGO, 1912).

4°. The principal argument is historical: it results from the fact that a very brilliant law-school existed in the East during the 5th century, the professors of which were the founders of many legal innovations that the codification of JUSTINIAN appropriated.

I shall refer to this law-school in detail in a subsequent lecture.

In conclusion, the second characteristic of the codification is to be scientific or scholastic, not practical.

§ III. THE NON-FORMALISTIC NOTE.

According to the degree of liberty granted by law to citizens in the transaction of their legal business, a legal system becomes either *formalistic* or *non-formalistic* (substantial): the first is bound to obligatory forms in practice and procedure; the second, in principle, leaves liberty to the parties.

Classical Roman law was still formalistic, although in a less degree than primitive law. During the first three centuries of the Christian era, many formal acts were required by the law of persons, of *iura in re*, of contracts, of succession and finally of procedure, which last was ordinarily the "formularly" drawing its name from the rigid *formulae* of actions.

The law of JUSTINIAN, on the contrary, is informal (substantial). As you know, almost all the formal acts of the older periods disappeared from the codification: for instance, *mancipatio*, *in iure cessio*, contract *litteris*, *cretio*, etc. . . . The few surviving formal acts are less rigorous and less intricate than in the past: *i. e.* *manumissio*, *adoptio*, *emancipatio*, *stipulatio*, *testamentum*. As to procedure, the forms of the procedure by *libellus* are undoubtedly much more supple than the *formulae*, since that procedure is nothing but a variety of the *cognitio extra ordinem*, which took place without any *formula*.

Also, a number of interpolations has been discovered, which

reveals the non-formalistic nature of the law of JUSTINIAN. But there are still many such to be indicated, particularly in the matter of Actions; moreover, the test based upon this characteristic has still to be used to explain many phenomena, which are incorrectly understood or insufficiently distinguished hitherto (on these two topics, see my volume devoted to the "Nature des Actions, etc...").

I should like to give you a few illustrations of my idea.

1°. This explanation will permit me to complete the quite remarkable views of Prof. BIONDO BIONDI (1920) relating to *iudicia bonae fidei*. The author has acutely detected the interpolations resulting from the transformation to which, in the law of JUSTINIAN, this important class of actions had been subjected. Nevertheless, up to now, he has not propounded any explanation of these interpolations. I think that they may be explained by the transformation of the forms governing the procedure of the *iudicia bonae fidei*. In the formalistic classical period, the *iudicium bonae fidei* was an action the formula of which contained the words "*ex fide bona*"; in the procedure by *libellus* of JUSTINIAN, as already in the procedure by *litis denuntiatio*, the earlier variety of the *cognitio extra ordinem* or procedure without *formula*, the *iudicium bonae fidei* is any action in which the judges enjoy a wider discretion. Therefore, the existence of the *hereditatis petitio* and of the *actio ex stipulatu (dotis)* among the *actiones bonae fidei* in the Institutes 4, 6, 28—29, is neither so ridiculous nor so inexplicable as modern authors affirm.

2°. By the same reasoning, I explain the necessity which drove the Byzantines to create the parallel class of the *actiones stricti iuris* (which Prof. BIONDO BIONDI had previously shown to be unknown to the classical jurists).

3°. I explain also the change of the sense of the terms *iudicia contraria* (*actiones contrariae*) discovered by the same writer, who up to now has given no reason or explanation for the fact.

4°. And finally the change of the sense of the terms *actio arbitraria* and the formation (only in the Byzantine law) of a particular group of *actiones arbitrarie* (GASTON MAY, B. BIONDI) which includes, with the older classical *actio arbitraria (de eo quod certo loco)*, those actions the *formula* of which had contained the *clausula arbitraria*.

§ IV. THE CHRISTIAN NOTE.

The last characteristic refers to the influence of Religion on Roman law. Its extent will be found to be less broad than that of the previous characteristics.

Like primitive law, classical law underwent the influence of Paganism. The law of JUSTINIAN underwent that of Christianity. These two facts are undeniable.

Nevertheless, a controversy still exists between contemporary writers about the precise extent of the influence of Christianity on the law of JUSTINIAN outside the topics in which it is self-evident.

An opinion (formerly TROPLONG, to-day RICCOBONO) attributes to Christianity the broadest influence; in particular, this school professes to discover Christian influence in the conceptions involved by several newly found interpolations: *aequitas*, *benignitas*, *ius tollendi*, etc....

The opposite opinion (BAVIERA, 1912) refuses to derive these conceptions from Christianity, but attributes a greater influence to economic than to religious causes in the development of law.

To judge the two theories, it would be necessary to enter into details, which I do not intend to do.

I shall only confirm the opinion of Prof. BAVIERA to the effect that this important problem can be solved only by a thorough study of the points in controversy and by application of the critical and historical methods.

As usual, this last method will lead to discovery of the actual source of these new conceptions, of the period of their birth, of the place and atmosphere in which they originated.

We are still unaware of the answer which Prof. BAVIERA will give to the problem, in his promised work. For my part, I believe that historical researches carried out with the greatest prudence will reveal the three following conclusions:

1°. These conceptions did not originate in Christianity at all.

2°. They did not arise (save exceptionally) from economic causes, as one may expect Prof. BAVIERA to suggest.

3°. They were formed before JUSTINIAN, in a Greek and still pagan atmosphere, under the influence of the Neo-platonists or of the Greek law in force in the Eastern Empire.

To prove this thesis would take too much time. I will only say that my conclusions are consequences of the general truth that most of the innovations ordinarily attributed to JUSTINIAN himself date from an earlier period and were previously embodied in pre-JUSTINIAN interpolations, elaborated by the legal science of a law-school.

I discovered this general principle before the announcement by Prof. ALBERTARIO of a book in preparation dealing with pre-JUSTINIAN interpolations. I merely indicate it, with the view of developing it more precisely in a later lecture.

I must, indeed, not be content to have disengaged the three chief general characteristics of the law of JUSTINIAN: oriental, scholastic, non-formalistic. In the study of the spirit of any legislation, to outline its characteristic features is only a part of the historians' task and, in spite of the difficulties, the easier part. Jurists or historians achieve their work only by penetrating deeper into the causes which explain the legal characteristics. Then, I shall endeavour to perform this service for JUSTINIAN's legislation by studying the process of its genesis. It will then be possible in the conclusion of these lectures to offer the desired explanation of the three characteristics with which we have been occupied to-day.

THIRD PROBLEM.

The Sources of the Codification of Justinian.

The sources of the codification of JUSTINIAN, as described by various treatises on Roman law, are of several kinds:

1°. Classical sources of his *Code* come from the Hermogenian and the Gregorian Codes; — classical sources of the *Digest* come from the works of the jurisconsults; — classical sources of the *Institutes* come from the Institutes of GAIUS and other elementary text-books.

2°. For the *Code* in particular, we must add some post-classical sources extracted from the Theodosian Code, the post-Theodosian Novels, the constitutions of the Emperors just before JUSTINIAN.

3°. In the *Code* also, the compilers included many constitutions of JUSTINIAN himself.

4°. Finally, in the three works, the commissioners made numerous alterations in the classical and post-classical texts. These are called "interpolations" and, along with all except the earlier constitutions, must be classified as Byzantine in opposition to classical sources.

The study of the sources (of which PAUL KRUEGER's classical book still gives the best general view) has been brought by writers to varying degrees of completeness, in respect of the Code, Institutes and Digest:

1°. As regards the *Code*, ROTONDI deeply and exhaustively examined its connection with the three antecedent Codes, the Hermogenian, the Gregorian and the Theodosian (cf. his studies in the *Bull. dell' Istit. di dir. rom.*, 1915 and 1918). — One Oxyrhynchus Papyrus (P. Oxy. 1814), just published by Prof. HUNT (t. XV, p. 217—222), extends our knowledge of the connection of the 1st edition of the Code with the Theodosian.

2°. As regards the *Institutes*, the critical study of their sources has progressed even further than that of the Code and Digest, owing to the researches of REIMARUS (1830), MISPOULET (1890), FERRINI (1890, 1893, 1901), CH. APPLETON (1891) and, above all, ZOCCO-ROSA, whose valuable *Palingenesia* dates from 1908—1911 and who promised to give as soon as possible a critical edition of the Institutes.

3°. As regards the *Digest*, its classical as well as its Byzantine sources are becoming better and better known. Nevertheless, if we consider many special texts, the fact is overwhelmingly plain that writers have not yet endeavoured to discover the contributory sources of composite fragments (save exceptionally) and that the famous edition of the Digest given by MOMMSEN and PAUL KRUEGER does not supply a sufficient and consistent indication of the ascertainable sources of such composite fragments, as would certainly be supplied in like case by an editor of literary and historical works.

Among the problems raised by the study of these sources, the particular one which I want to examine is one aspect of the interpolation problem.

There are undoubtedly innumerable differences between classical Roman law and the law of JUSTINIAN, as it stands revealed by

its innovations. We have already remarked the general characteristics of these innovations; as for their enumeration, you can refer to recent text-books on Roman law (for example, that of Prof. P. F. GIRARD), although they are still incomplete.

These Byzantine innovations are of two kinds:

1°. The first are contained in the reforms of JUSTINIAN;

2°. The second, which are much more numerous, were effected by the indirect and anonymous means of interpolations in classical and post-classical texts.

Those of the first class certainly are due to the personal initiative of the commissioners. May we say the same thing about the interpolations? — Surely we may confidently say so as regards those which are pure consequences of the reforms of JUSTINIAN. — But, as regards the others, are we to believe implicitly that they are also the fruits of that initiative? Or, on the contrary, may we not imagine that the commissioners, in their work of adapting classical sources, frequently made use of already existing post-classical sources?

This new problem is closely bound up with the question of pre-JUSTINIAN interpolations, which should be divided into two enquiries:

a) the demonstration of the existence of pre-JUSTINIAN interpretations;

b) the discovery of their origin.

I. — *The existence of pre-Justinian interpolations in the codification.* — I will not insist on this point. Prof. F. DE ZULUETA, in his remarkable inaugural lecture, said about it: "The question of pre-JUSTINIAN interpolations is deeply important for the legal history of the fourth and fifth centuries, but its solution appears to present insuperable difficulties" (p. 16).

I shall not allow these difficulties to decide me to pass over the problem: I refer for proofs to the II^d Part of my "Etudes" in preparation since 1914, which is devoted to the subject. The problem is also being studied by Prof. ALBERTARIO, as I said above. I pass over the problem on the present occasion, because I want to save time for the second point, which is infinitely more obscure and important.

I confine myself to three aspects of it:

1°. The quantity of pre-JUSTINIAN interpolations is more considerable than authors believe. They must be minutely distinguished from interpolations invented by the commissioners, which alone merit the name of "Tribonianisms".

2°. One first practical difficulty consists in the discovery of the tests by which we can effect the distinction between pre-JUSTINIAN interpolations and Tribonianisms. Prof. ALBERTARIO announces that the criterion is to be found in the didactic character of the first in opposition to the legislative of the second. This criterion, as a matter of fact, has been discovered, with others, by ROTONDI (1914).

3°. Another practical difficulty consists in distinguishing pre-JUSTINIAN interpolations (the origin of which is in the post-classical period and, more exactly, in the 5th century, as I will demonstrate) from classical and post-classical glosses.

To solve these three problems would involve entering upon a critical study of special texts, which I do not intend to do.

II. — *The origin of the pre-Justinian interpolations.* — The most urgent task is to attack the general problem of the origin of the pre-JUSTINIAN interpolations, a problem which depends entirely on the discovery of the post-classical sources used by the commissioners when they made their innovations upon the ancient sources.

A few scholars have already agreed upon the fact that the commissioners used post-classical sources whence they extracted pre-JUSTINIAN interpolations.

What are these sources? The opinions of authors are not in accord. As they are not referred to either by PAUL KRUEGER or by the ordinary treatises on Roman law, I should like to devote to them a little time in which I shall sum up the conclusions of the II^d Part of my "Etudes".

Some more or less ancient German scholars believed that the commissioners borrowed from pre-JUSTINIAN legal works: REIMARUS (1830), HEIMBACH (1870), HOFMANN (1901), EHRENZWEIG (1901). But, as was said by the most recent author who has studied the question, HANS PETERS (1913), in this matter, what we need are proofs and nothing but proofs. Authors, up to that time, had given few or none. PETERS believed that he was more

fortunate than others. Let us pause one minute to examine his renowned monograph: *Die oströmischen Digestenkommentare und die Entstehung der Digesten* (The Oriental commentaries of the Digest and the genesis of the Digest).

PETERS proposed to prove that in the East there existed, before the Digest, a pre-JUSTINIAN compilation, a work quite analogous to the Digest itself, composed, like the Digest, of extracts from classical jurists frequently interpolated as in the Digest. This unofficial work must have deeply inspired the makers of the Digest in their official labours. It must have been compiled in Berytus (Beirut), in the period of the first generation after the ἡρώες (who were the most celebrated representatives of the 5th century Syrian law-school), *i. e.* contemporary with Leontius, the son of EUDOXIUS (one of these ἡρώες) and the father of ANATOLIUS, circa 487 or rather between 438 and 487.

The pre-JUSTINIAN compilation, which thus sprang from the brain of PETERS, was baptized by the sharpest of his critics, GIOVANNI ROTONDI, with the quite appropriate name of "Pre-Digest".

In a few pages, ROTONDI presented the refutation of an hypothesis more brilliant than exact, and, since then, the non-existence of the so-called "Pre-Digest" seems to have become an uncontested fact.

For, as I have shown in my II^d Volume, among the arguments of PETERS, some lack authority and others, which I accept, do not point at all to the existence of a "Pre-Digest", but to another hypothesis which I believe to be better founded.

Following the suggestions of ROTONDI, I think that the commissioners of the Digest had recourse to post-classical works, whence come the pre-Justinian interpolations, so abundantly extant in the Digest. Naturally I cannot judge whether Prof. ALBERTARIO, in his projected book, will determine the nature of these works. At any rate, for my part, I have reconstructed them as follows:

1°. These works, in my opinion, were in Greek, not in Latin, as PETERS' "Pre-Digest" must have been.

2°. Whereas PETERS' "Pre-Digest" must have been composed of classical extracts previously interpolated (like the Digest itself),

the Greek works, in my opinion, were chiefly collections of scholia on the great classical books the doctrines of which they reproduced, but sometimes altered by means of interpolations. These are true pre-Justinian interpolations and must not be confused with the post-classical Latin glosses noted on or incorporated in the Latin classical texts. A unique example of such Greek works has been preserved in the *Scholia sinaitica*.

3°. Certain texts prove that the makers of these Greek collections were the professors of the 5th century law-school of Berytus, the men whom the Scholia of the Basilica called by a general name: οἱ τῆς οἰκουμένης διδάσκαλοι. No one has yet observed the absolute identity between this Greek title and the Latin title: *Viri docti in omnem orbem terrarum* in the *Descriptio orbis terrae* § 25. A French translation is "les Maîtres oecuméniques" (oecumenical masters). I will translate the double title still more precisely: "the oecumenical Doctors". It is preferable to adopt this title rather than that of οἱ ἥρωες, which is a common insignificant epithet applied to deceased persons and which really means *the late so and so* (in French "feu un tel").

The teaching of these Doctors gave an exceptional brilliance to the Berytus law-school in the 5th century. Modern historians of Roman law allow it a celebrity which surpassed the fame of the contemporary schools of the East and West. But they limit themselves to stating the fact. They do not endeavour to justify it with arguments drawn either from historical sources or from the legal works of the Berytus Doctors which have come down to us.

I hope however by minute research pursued even in Beirut (which I visited last November) to succeed in proving the justice of the opinion of those jurists who, writing in the time of JUSTINIAN or shortly after, bestowed the highest praise upon their predecessors of Berytus.

In my opinion, the "oecumenical Doctors" were teachers of profound knowledge and broad culture, although, of course, they did not attain to the level of the great Roman jurists. They were agents of legal progress in the pre-JUSTINIAN period. Their works are almost entirely lost. Nevertheless, the influence of their thought is reflected in innumerable passages of the codification, not only in the Digest, but even in the Code and in the Institutes. Their

works or, more precisely, their scholia are the sources to be looked to for pre-JUSTINIAN interpolations. I will add some further details about them in my next lecture.

In conclusion, I may sum up my argument by saying that, besides the four groups of sources above mentioned and which are so easily distinguishable, the compilation of JUSTINIAN has a fifth source which, although abundant, has remained unperceived, *i. e.* Greek legal works of the 5th century Berytus Doctors.

FOURTH PROBLEM.

The Drafting of the Codification of Justinian.

The last of the general problems raised by the codification of JUSTINIAN is not the least interesting for historians. The question is to ascertain what method was followed by the commissioners in the drafting of the three books, Code, Digest and Institutes, and principally how the ancient sources of Roman law were utilized.

The problem has been studied only for the Digest. On account of its supreme importance and because several theories have already been expressed on the subject, I shall begin by speaking of its preparation. After which, I shall treat, with fewer details, of the drafting of the Code and Institutes, by applying to them the hypothesis which I shall put forwards about the Digest.

I. THE DRAFTING OF THE DIGEST.

In the opinion of the writers on Roman law, the method of the commissioners of the Digest must have been the following:

1°. They distributed among sub-commissions the works of classical jurists, dividing them into four classes: SABINIAN, EDICTAL, PAPINIANIAN, APPENDIX.

2°. Each of these sub-commissions made an abstract of the classical works committed to it and put aside the extracts which were to be incorporated in the Digest.

3°. Each of these sub-commissions interpolated the fragments which had been extracted, in accordance with the permission granted by the Emperor.

4°. The full commission finally proceeded to make a general

revision of the works of the sub-commissions, in order to give the completed work unity and harmony.

This almost universally adopted theory, which was originated by FRIEDR. BLUHME (1820), is merely hypothetical, since the constitution *Tanta — Δέδωκεν* gives no precise directions for the method to be followed by the commissioners.

It was however vigorously attacked by HOFMANN (1901), who rejected the idea of the distribution of classical texts into four classes. HOFMANN substituted a distribution according to subjects; above all, he believed that the commissioners employed pre-JUSTINIAN compilations unknown to us and specially a compilation of the *ius* ordered by THEODOSIUS.

Of his conclusions, only the last seems to be worthy of attention, although HOFMANN was mistaken about the nature of the pre-JUSTINIAN compilations probably used by the commissioners. The battle, which he waged against the hypothesis of the four divisions, has undoubtedly been lost: an examination of each title of the Digest confirms the justice of BLUHME's conception.

As to HOFMANN's arguments, partly confuted by Prof. BONFANTE (1902), one remains standing, in spite of BONFANTE's criticism, namely the shortness of the time which the commissioners spent in fulfilling their task, less than three years, really equivalent to one *annus utilis*.

Prof. BONFANTE, moreover, admits that HOFMANN rightly called attention to pre-JUSTINIAN works which he too considers as having facilitated the labours of the commissioners. But, no more than HOFMANN, does he try to define their nature.

PETERS (1913), agreeing neither with HOFMANN's criticism of BLUHME's theory, nor with EHRENZWEIG's intermediary theory (1901), believed that he had found the solution of the enigma by discovering his so-called "Pre-Digest", which I mentioned in my last lecture. Had such a compilation existed, all the difficulties would indeed have been removed: by aid of it, the commissioners would have been able to proceed with the maximum of speed. For, the "Pre-Digest" being a perfect model, their task would have been limited to harmonizing the "Pre-Digest's" texts with the legal reforms of JUSTINIAN, which task would have been very simple for a body of men whose most eminent members

had already participated in the preparation of these reforms. Unfortunately, PETERS' hypothesis is not at all correct; a "Pre-Digest" never existed, as we saw before.

Thus, I am compelled to propose quite a new hypothesis, which will take into account, on the one hand, the distribution of the classical texts into four divisions, a fact established since BLUHME's researches, and, on the other hand, the equally undeniable fact of the extremely rapid work of the Digest.

For, in my opinion, it is certain that, — had the compilers been obliged to read word for word all the works of the classical jurists, the fragments of which form the Digest, and still others indicated by the *Index Florentinus* from which no extract was retained — and had they been obliged also to effect throughout all the fragments interpolations whether by suppressing, adding to or changing the old text, — they would not have been able to fulfil their task in the extremely short time which they took.

The solution of the enigma, developed in the II^d Part of my "Etudes", is based on two fundamental ideas:

1°. The compilers neither read word for word all the classical books in order to select extracts for the Digest, nor did they invent every interpolation which appears in it.

2°. In their labours, they made use of pre-JUSTINIAN works.

These pre-JUSTINIAN-works are the Greek collections of scholia on the classical works, the existence of which has been previously demonstrated and which were composed by the "oecumenical Doctors" of the Berytus law-school.

Before showing how, in my opinion, the makers of the Digest worked, I want to outline the contents of these collections and to indicate their connection with classical works.

The starting-point of my ideas is the organization of the teaching of law in the East before JUSTINIAN. According to the constitution *Omnem* § 1, the instruction offered to students rested on six books (*libri, volumina*) which, with reservations, may be identified as follows:

1°. Institutes of GAIUS and *Libri singulares quattuor* [a) *de re uxoria* b) *de tutelis* c) d) *de testamentis et legatis*], studied, I think, in the *Libri ad Sabinum* of ULPIAN.

2°. *Prima pars legum* or *Πρῶτα*, studied in the *Libri ad Edictum* of ULPIAN.

3°. *Pars de iudiciis*, studied in the same *Libri ad Edictum*.

4°. *Pars de rebus*, studied in the same *Libri ad Edictum*.

5°. *Responsa* of PAPINIAN.

6°. *Responsa* of PAULUS.

These six books contained the original Latin text of the works of the jurists. They were commented upon by the 5th century professors in the Greek language by means of scholia. These scholia were incorporated into Greek volumes, an example of which we have in the *Scholia sinaitica*, the only text which shows the pedagogic method used in the pre-JUSTINIAN period.

Such being the case, I am absolutely convinced that the commissioners for the Digest based their work upon the *sex libri* of the law-schools. They were indeed either professors, or political officers, or lawyers, long acquainted, as masters or students, with the *sex libri*. How can one suppose that they could have passed over them, at a time when the opportunity of making use of them appeared to be most urgent? Thus, we are forced to admit that the *sex libri* and the Greek commentaries written upon them constitute the fundamental materials, the principal sources of the Digest.

Consequently, the outlines of the method used by the makers of the Digest may be presented in the following fashion:

1°. The commissioners distributed among themselves, not only the original works of the classical jurists enumerated in the *Index Florentinus*, but also the pedagogic *sex libri* and the Greek commentaries relative to them. Some were charged to examine the *Libri ad Sabinum*, others the *Libri ad Edictum*, still others the *Responsa Papiniani* and *Pauli*, starting in each case from the appropriate volumes of the *sex libri*, which were thus the origin of the three divisions: SABINIAN, EDICTAL and PAPINIANIAN. The works forming the Appendix were of course examined apart.

2°. In choosing the extracts to be retained from the extensive classical literature, they took as guide the Greek commentaries which had already indicated the most important passages [cf. for instance, *Schol. sinait.* § 18 with *Dig.* 25, 1, 3, 1 (ULP. lib. XXXVI ad Sab.) and *Dig. h. t.* 6 (PAUL. lib. VII ad Sab.)]. That

was, I think, the best way for the compilers to save time.

Equally they followed the sequence of fragments taken from different jurists as dictated by the same Greek commentaries, in the manner shown by the *Scholia sinaitica*. This is the easiest explanation of a problem still in controversy (LONGO), *i. e.* the insertion of a short fragment between two long ones.

As to the fragments of the Digest not drawn from the *sex libri*, the compilers found many of them indicated in the Greek commentaries by means of a reference to the original source where they proceeded to look for them. This does not exclude the possibility of their selecting on their personal initiative further fragments.

3°. The commissioners must have introduced interpolations into the chosen extracts. — Some of them called *pre-Justinian interpolations* were suggested to the compilers by the 5th century Greek commentaries which were full of such alterations coming from the scholastic work of several generations of professors. But, as the pre-JUSTINIAN interpolations were parts of Greek scholia, they had to be translated into Latin. — Others, *Tribonianisms* (in the strict sense) were introduced into the extracts, in consequence of reforms of JUSTINIAN or of personal ideas of the commissioners.

4°. After which, PETERS believed that the commissioners were to collate the fragments in draft with the original classical texts. He holds that this collation was ordered by JUSTINIAN (Const. *Deo auctore* § 4; Const. *Tanta* — *Ἀέδωκεν* §§ 1, 17). — Such a collation, if proved, would be an absolute demonstration that the compilers did not take for their starting-point the original classical manuscripts, as modern scholars affirm.

5°. The commissioners probably met in full committee to arrange by titles the duely interpolated extracts, following a previously settled plan, and to collect the titles into the unified work, once more according to the previous general plan.

The result of these numerous operations is the Digest, the very "body" of the *ius* (in French "*somme*"), a labour which was so much the more difficult because its makers had to guide them no existing model comparable to those which facilitated the compilation of the Code and Institutes. Consequently, their clever-

ness is worthy of praise; but the merit of the Berytus masters who aided them enormously is still greater, since the Berytus men were the real inventors of the innovations contained in so many interpolations.

And, just because the commissioners found in the works of the 5th century the heaviest part of their task already prepared, *i. e.* the adaptation of the classical texts to the ideas and institutions of the Eastern Empire, they succeeded in achieving their labour very quickly in spite of all the difficulties. Precisely, there are in the Digest numerous imperfections and mistakes to be explained by the haste with which it was carried out.

II. THE DRAFTING OF THE CODE.

The completion of a Code had been the earliest wish of JUSTINIAN and, originally, the only one. His aim, here, was to imitate Theodosius the II^d and also, as I previously said, the Barbarian Kings of the West. Nevertheless his conception of the Code was different from and wider than that of those rulers, because JUSTINIAN intended to combine the three ancient Codes, to add post-Theodosian constitutions and his own laws, and finally to authorize the commissioners to revise the ancient texts and to interpolate them.

What was the method used in the working out of this project?

The existence of the previous three Codes facilitated the undertaking. Moreover, I think that, as in the drafting of the Digest, the compilers for the Code based their work upon other pre-JUSTINIAN sources, which in this case also were various Greek collections of scholia on the three ancient Codes, which may even yet be reconstructed in part and which were likewise products of the 5th century law-school of Berytus, where the Imperial constitutions were studied in an informal fifth academic year.

The pre-JUSTINIAN interpolations which can be recognized in the Code as well as the Digest and even the compilers' plan in their choice of constitutions to be embodied in it originated in these Greek collections.

To these constitutions the commissioners added some later enactments preserved in the Imperial Chancery and the laws of JUSTINIAN himself.

They made also in the ancient texts the interpolations rendered necessary by the reforms of JUSTINIAN or by their personal ideas.

Finally, they arranged by titles the duely interpolated constitutions, following the chronological order, and collected the titles into the unified work, according to the previously settled plan.

III. THE DRAFTING OF THE INSTITUTES.

The elaboration of the Institutes is connected with the reform of legal studies brought into effect by JUSTINIAN. The Emperor decreed that first year's students should learn the elements of law from an official text-book, which was to replace the unofficial text-book of GAIUS, this last having become, in many respects, thoroughly out-of-date.

Like the Code, the Institutes are an original work in the sense that they are not a mere adaptation of GAIUS' text-book. Indeed, as you know, they contain in the first place numerous extracts from classical elementary works other than GAIUS; secondly, they contain references to JUSTINIAN's reforms; thirdly, it is possible to discover in them pre-JUSTINIAN interpolations and Tribonianisms.

According to the common opinion, the procedure of the commissioners in compiling the Institutes was to take the classical texts which they required direct from GAIUS and the other elementary treatises; after which they went on to interpolate the extracts as seemed proper to them.

For my part, I believe that, on the contrary, the commissioners still here found ready to hand various pre-JUSTINIAN Greek works, *i. e.* various collections of scholia which had been added to the Institutes of GAIUS by the 5th century law-school of Berytus.

As I previously recalled to your memory, the Institutes of GAIUS contained in the first book of the pedagogic *sex libri* were studied before JUSTINIAN in the 1th academic year. The professors commented upon them — by pointing out the passages of this 2nd century text-book which were still of use to 5th century law-students, — by completing the passage of the Institutes of GAIUS with many extracts from his *Res cottidianae* and from other elementary treatises, — by noting additions, changes, suppressions to be effected in the original text of GAIUS.

In my opinion, these Greek commentaries guided the makers of the Institutes.

For lack of time, I shall not develop this theme. I prefer merely to draw your attention to the three following points:

1°. Although the critical study of the sources of the Institutes has progressed very far (as we have previously seen), that study must be deepened by taking into account the influence of pre-JUSTINIAN Greek scholia.

2°. The Institutes contain numerous passages which are to be found also in the Digest. The natural assumption is that the passages of the Institutes were taken from the Digest. But one is met with a difficulty because there are too frequent variations between the two texts. To solve this problem, it will be necessary to look into the pre-JUSTINIAN sources.

3°. Finally a particular and larger problem relates to the Greek Paraphrase of the Institutes composed by THEOPHILUS. The studies of FERRINI (1883) and BROKATE (1886) on this matter are by no means exhaustive. I hope that the time is not distant when I shall be able to make known in one volume of my "Etudes" my own opinions about the nature of the Paraphrase, its sources and its connection with the teaching of the pre-JUSTINIAN Berytus professors.

GENERAL CONCLUSION.

The ideas which I have presented in these four lectures lead to the solution of two important questions, which arise quite naturally in the mind:

1°. It is now not difficult to understand why the codification of JUSTINIAN is endowed with the general characteristics previously indicated: oriental, scholastic and non-formalistic. They are explained by the fact that the innovations, which give the codification its most original features, existed in the legal works composed by the 5th century Berytus „oecumenical Doctors”, which works, of course, possessed the same characteristics.

2°. When JUSTINIAN ordered the codification of the three law-books, under whose influence was he acting? As it is very improbable that he took the initiative alone, who inspired him? The Empress Theodora? the *magister officiorum* and *quaestor*

sacri palatii Tribonian? I contend that, besides these very well-known personages, another who is less known may have intervened: *i. e.* LEONTIUS, to whose career I recently (1921) called the attention of the "Académie des Inscriptions et Belles-Lettres". I thought of him, because the more I study, by means of the historical method, the genesis of the law of JUSTINIAN, the more I realise how deep was the influence exercised upon it by the teaching of the Berytus law-school. Now, LEONTIUS, at the outset of the work of codification, was a celebrated ex-professor of Berytus, — he was heir of the science of the "oecumenical Doctors" (for he was the son of one of these professors, EUDOXIUS), — he had also become a high officer of the Eastern Empire (*praefectus praetorio Orientis*), — he was a member of the Imperial court (*patricius*). It would indeed be very peculiar that such an eminent jurist, for whom a place on the commission for the 1st Code was to be reserved, should have been kept unaware of the projected codification. On the contrary, everything points to the fact that he was one of its inspirers. Perhaps even he was the chief initiator of a gigantic undertaking in which the works of his predecessors and, probably, his own, play such an important part.

. I should like to conclude by professing my satisfaction at having been able to express the perfect harmony of my thoughts with those of Prof. F. DE ZULUETA, who said, at the end of his inaugural lecture: "Everything which adds to our knowledge of Byzantine scholasticism and of the details of the compilers' procedure becomes of the first importance" (p. 23). I have treated of these two questions and of no others. The recognition of their importance concurrently in English and French Universities proves the existence of an intellectual Entente between our two Nations, which we must all cooperate in promoting.

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